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# Directive 11-1: Limited Time Allowance for Withdrawal of Election Made in Connection with 2009 Combined Report

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Please note that the "online application" to be utilized "through Webfile for Business," as referenced in this Directive 11-1, is not yet available but should become available on Thursday, January 27<sup>th</sup>. The Department will provide further notice as to the availability of this application when it becomes available.

### I. Introduction

This Directive applies to the situation in which a group of corporations constituting a combined group within the meaning of recently-enacted G.L. c. 63, § 32B, has filed a combined report in Massachusetts pursuant to § 32B for its 2009 taxable year, where in so doing the combined group made, on the required Form 355U, an "affiliated group election" on line 2 or a "worldwide election" on line 3. The Department has reason to believe that some combined groups made one of these elections, both of which are binding for a ten year period and which have the potential to result in tax consequences that are very different from how the combined group would be taxed in the absence of such election, in error. Therefore, this Directive announces that the Department of Revenue will, for a short period of time, until March 15, 2011, allow any combined group of corporations that has previously made either an affiliated group election or a worldwide election upon filing its combined report for its 2009 taxable year to withdraw that election consistent with the provisions of this Directive.

### II. Background

For taxable years beginning on or after January 1, 2009, a corporation is required to file a combined report when it is subject to tax under G.L. c. 63 and engaged in a unitary business with one or more other corporations that are required to file a combined report pursuant to G.L. c. 63, § 32B. The rules that apply under G.L. c. 63, § 32B are set forth in the combined reporting regulation, 830 CMR 63.32B.2.

The taxable member or members of a combined group engaged in a unitary business may elect to determine their apportioned share of the aggregate taxable net income or loss derived from a unitary business pursuant to a worldwide election under which each taxable member shall take into account the income and apportionment factors of all the members, wherever located, includible in the combined group. However, if the taxable members of a combined group do not make this election, each taxable member shall determine its apportioned share of such income on a water's edge basis. See 830 CMR 63.32B.2(5)(b). The mechanics for making a worldwide election are set forth in CMR 63.32B.2(5)(c).

In any instance in which a combined group does not make a worldwide election and is therefore to file on a “water’s edge” basis, the one or more taxable members of the combined group may elect to treat as their combined group all corporations that are members of their Massachusetts “affiliated group” as defined by 830 CMR 63.32B.2. See G.L. c. 63, § 32B(g). The Massachusetts affiliated group election dispenses with the determination as to the parameters of the group of corporations that are engaged in a “unitary business.” However, significantly, the membership of a Massachusetts affiliated group as applied for combined reporting purposes is not limited to those corporations that are members of a federal affiliated group as determined under IRC § 1504 (i.e., generally those corporations that participate in the filing of a federal consolidated return). Rather, the Massachusetts group will include any corporation that participates in the filing of a federal consolidated return and also includes corporations more than 50% of whose voting interests are commonly controlled instead of the 80% control by vote and value standard applicable for federal consolidated return purposes.<sup>[1]</sup> Also, the Massachusetts affiliated group will include certain non-U.S. corporations that would not be included in a federal consolidated return.<sup>[2]</sup> The rules that govern the Massachusetts affiliated group election are generally set forth at 830 CMR 63.32B.2(10).

Aside from the possible inclusion of “non-unitary” combined group members that would not otherwise be included in the Massachusetts combined group, the Massachusetts affiliated group election also alters the determination of what income and deductions of each member are includible in the combined group’s taxable income. For example, when an affiliated group election is made, the combined group’s taxable income includes not only the apportionable income of the group members without regard to whether the income is derived from the group’s unitary business but also includes income of any affiliated group member that would otherwise be allocable income. Therefore, if any member of the affiliated group is taxable on its income from business activity in another state, all of the income of every affiliated group member is treated as apportionable income, irrespective as to whether, for example, such income would be allocable to a particular state in the absence of the affiliated group election.

Both an affiliated group election and a worldwide election are irrevocable and binding for the taxable year for which the election is made and for the next nine taxable years. Therefore, even if the election chosen has no practical implications for a combined group for its 2009 tax year as compared to what the tax consequences for the group would be in the absence of such election, the election could have significant tax consequences for the group in a subsequent tax year.

Because a combined group that makes an affiliated group election is to file on a “water’s edge” basis, a combined group that makes or is subject to an affiliated group election cannot make a worldwide election, and vice versa. However, a combined group is not required to make either an affiliated group or a worldwide election.

### III. Filing Requirements; Apparent Transitional Issue with Respect to the Affiliated Group or Worldwide Election as Made for Some Combined Groups’ 2009 Tax Year

For taxable years beginning on or after January 1, 2009, a combined group that is filing a combined report pursuant to G.L. c. 63, § 32B is required to file Form 355U, “Excise For Taxpayers Subject to Combined Filing,” and the schedules that are required to be filed with such Form. For combined groups filing for the 2009 tax year, Question 2 of Form 355U asked: “Are you making or are you subject to an affiliated group election?” Similarly, Question 3 of such Form 355U asked: “Are you making or are you subject to a worldwide group election?” There was no box on the 2009 Form 355U that specifically indicated a preference for neither election to apply.<sup>[3]</sup>

For taxable years beginning on or after January 1, 2009, all combined groups are required to electronically file and to pay tax on their income using software offered by authorized vendors and approved by the Commissioner. TIR 09-18. The filings reporting the income of the members of such groups are to be filed on behalf of such members by the groups’ principal reporting corporation on behalf of the group. *Id.* See 830 CMR 63.32B.1(11)(a).

Based upon communications with taxpayers and taxpayer representatives, the Department believes that some combined groups filing for the 2009 tax year may have erroneously checked the box electing the affiliated group election or the worldwide election either because they: (1) mistakenly

thought that they had to pick either the affiliated group election or the worldwide election; (2) in the instance of the affiliated group election, did not understand the consequences of making the election; and/or (3) were forced involuntarily to make one of the two elections by the tax software they were using.

#### IV. Limited Time Allowance to Withdraw an Affiliated Group or Worldwide Election Made by a Combined Group for its 2009 Tax Year; Rules Related Thereto

Although the affiliated group and worldwide elections are ten year binding elections, the Department recognizes that, given the newness of the state's combined reporting law and some first year difficulties with the new tax filing software, some combined groups may have erroneously made one of these two elections. Therefore, despite the fact that each election is a ten year binding election, the Department will permit any combined group that filed or files its 2009 combined report in a timely manner on or before January 31, 2011 and that further checked or checks the box in question 2 or question 3 on Form 355U to elect either the affiliated group or worldwide election, to withdraw that election by filing an on-line application on or before March 15, 2011. Any withdrawal sought to be made after such date will not be recognized. The online application is available through Webfile for Business and is to be submitted by the combined group's principal reporting corporation. See 830 CMR 63.32B.1(11)(a).

A combined group that seeks to withdraw either its affiliated group or worldwide election will not be required to justify that withdrawal by proffering a reason for its prior erroneous election. However, in some cases the withdrawal of either election may alter the combined group's Massachusetts tax due in connection with the filing if the rules that apply in the case of an election altered what the group's tax computation would have been in the absence of the election. In these cases, the combined group is also required to electronically re-file its combined report, in which case it should check the box that states that the filing is an amended return.<sup>[4]</sup> If in such case the taxpayer owes additional tax, interest but not penalties shall also apply. If on the other hand the taxpayer is due a refund the taxpayer must also complete and manually file a completed Form CA-6 to receive such refund. In any case in which a combined group is required to re-file its combined report it must *both* submit the online application to withdraw its election *and* re-file its combined report on or before March 15, 2011, or its attempt to withdraw its election will not be recognized. Further, a combined group that is seeking a refund in connection with its re-filed combined report must file the Form CA-6 requesting such refund on or before March 15, 2011, or its refund request will not be accepted as timely.

This Directive only applies to combined groups that made an affiliated group or worldwide election on an original timely-filed combined report made for the 2009 tax year on or before January 31, 2011. As either election is only valid when made on an original, timely-filed return or as otherwise required in writing by the Commissioner, any such election that was not so made is not valid. 830 CMR 63.32B.2(10)(d). This Directive applies to an affiliated group or worldwide election made on an original timely-filed combined report made for the 2009 tax year when made on or before January 31, 2011, irrespective as to when that filing was made. However, this Directive does not apply to any combined report filings that are made subsequent to January 31, 2011. Note that in any instance in which a person has difficulty filing a combined report that person should, as has been true previously, contact the Customer Service Bureau at (617) 887-MDOR (6367).

Any combined group that withdraws its affiliated group or worldwide election as made in connection with its 2009 combined report pursuant to the terms of this Directive may nonetheless make either election in connection with its 2010 or a subsequent combined report, consistent with the rules for making the election, as if no prior 2009 election had been made.

/s/Navjeet K. Bal

Navjeet K. Bal  
Commissioner of Revenue

NKB:MTF

January 20, 2011

[1] Further, unlike in the context of a federal consolidated return, the control of members of the Massachusetts affiliated group may be direct or indirect, and the common owner or owners may be corporate or non-corporate. Thus, for example, two or more federal consolidated groups would be combined in one Massachusetts affiliated group filing if both consolidated groups were commonly owned by a non-US corporation.

[2] See G.L. c. 63, § 32B(c). Also, S corporations and REITs and RICs can be included in a Massachusetts combined report although they are excluded from a federal consolidated return.

[3] However, a box that allows for a combined group to specify that it is not making, and is not subject to, an affiliated group election or a worldwide election has been added to the Form 355U to be filed for the 2010 tax year.

[4] The characterization of the re-filing as an amended return will allow the software to accept it.